Accounting Publications Sdn Bhd v Ho Soo Furniture Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-579 OF 1996
GOPAL SRI RAM, SITI NORMA YAAKOB AND ABU MANSOR JJCA
19 NOVEMBER 1997

Arbitration *— Stay of proceedings — Application — Dispute between parties — Agreement to refer disputes to arbitration — Defendant applied to stay action — Stay refused on ground that dispute did not come within terms of agreement to arbitrate — Whether parties should be compelled to adhere to agreement — Whether controversy between parties amounted to 'dispute or difference concerning the contract'*

Arbitration *— Stay of proceedings — Application — Dispute between parties — Defendant applied to stay action — Judicial commissioner required defendant to show reasons why parties should arbitrate — Burden imposed by law reversed — Whether judicial commissioner had erred — Whether arbitration clause ousted jurisdiction of court*

The respondent ('plaintiff') entered into a contract with the appellant ('defendant') for work and materials. It contained a clause by which the parties agreed to refer their disputes to arbitration. A controversy later arose between the parties about the liquidated and ascertained damages which the defendant alleged was due from the plaintiff because of the latter's delay in carrying out the work in question. The plaintiff's solicitors wrote to the defendant demanding the sum allegedly due to their client. The defendant disputed the sum claimed and said that if a suit was commenced, the defendant would apply to stay it because of the agreement to arbitrate. Despite this, the plaintiff issued writ. The defendant then took out a summons to stay the action in reliance of the arbitration clause. The judicial commissioner refused to stay the action primarily on the ground that there was no dispute between the parties that came within the terms of the agreement to arbitrate. The defendant appealed against the refusal to grant a stay. Counsel for the plaintiff argued that the decision of the judicial commissioner ought to be upheld for two reasons; that the defendant's affidavit in support merely said that it was ready to proceed to arbitration but did not say that it was ready and willing to do so, and that the defendant had taken a step in the action before making its application for a stay.

Held, allowing the appeal:

(1) In investigating whether there was a dispute that fell within the arbitration clause, the judicial commissioner exceeded the role assigned to her when dealing with an application for a stay of proceedings under s 6 of the Arbitration Act 1950 ('the Act'). A court must compel the parties to adhere to the terms of the arbitration agreement entered into by them even though it may appear from the evidence that the defendant is unlikely to succeed

before the arbitrator (see p 503E–G); *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 followed.

(2) The phrase 'dispute or difference concerning the contract' used in the present instance was wide enough to include the kind of controversy that existed between the plaintiff and the defendant immediately prior to the issuance of the writ. A failure to agree may not be a dispute, yet it is a difference. However, the judicial commissioner in the present appeal only directed her mind to the word 'dispute' but omitted from consideration the words 'or difference'. Had she done so, she would have found that it amounted to a 'difference' even if it did not amount to a 'dispute' (see p 506H–I); *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273 followed.

(3) The judicial commissioner required the defendant to show why the parties should arbitrate and not litigate. However, it was for a plaintiff to demonstrate why an agreement to arbitrate that was plainly binding upon the parties should be thrown overboard. Therefore, the judicial commissioner appeared to have reversed the burden imposed by law. Further, she appeared to have proceeded upon the basis that the arbitration clause had the effect of ousting her jurisdiction. This was a misdirection as such a clause did not oust the jurisdiction of the court but gave the court a discretion to grant a stay pending arbitration (see p 509D–G).

(4) An application for stay under the Act does not fail because a defendant fails to employ the phrase 'ready and willing' in his affidavit in support. What is essential is that the court should, on the material before it, be in a position to express its satisfaction that the defendant is ready and willing to do all things necessary to the proper conduct of the arbitration. The plaintiff fails to recognize that at such an early stage, there is little a defendant is obliged to do in the arbitration beyond asserting a willingness to appoint an arbitrator. The available evidence here supported the inference that the defendant was ready and willing to do all things necessary to the proper conduct of the arbitration. Further, from the chronology of events, the defendant did not take any step in the proceeding before moving the court for a stay (see pp 509I and 510A–F); *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 followed.

[Bahasa Malaysia summary

Penentang ('plaintif') telah mengikat kontrak dengan perayu ('defendan') bagi melaksanakan kerja dan menyediakan bahan-bahan. Ia mengandungi fasal yang menunjukkan persetujuan kedua belah pihak untuk merujuk segala pertikaian di antara mereka kepada timbangtara. Suatu kontroversi kemudiannya timbul di antara kedua

belah pihak berhubung dengan ganti rugi jumlah tertentu dan telah dipastikan yang didakwa oleh defendan harus dibayar oleh plaintif akibat kelewatan plaintif dalam melaksanakan kerja berkenaan. Peguam plaintif telah menulis kepada defendan menuntut jumlah yang mana defendan telah didakwa berhutang dengan kliennya. Defendan telah mempertikaikan jumlah yang dituntut dan mengatakan bahawa jika suatu guaman dimulakan, defendan akan membuat permohonan untuk menggantungnya berasaskan kepada perjanjian untuk menimbangtara. Sungguhpun begitu, plaintif tetap juga mengeluarkan writ. Defendan kemudiannya memohon saman bagi penggantungan tindakan dengan bergantung pada fasal timbangtara. Pesuruhjaya kehakiman enggan menggantung tindakan terutamanya atas alasan bahawa tiada pertikaian di antara kedua belah pihak yang termasuk di dalam terma perjanjian untuk menimbangtara. Defendan telah merayu terhadap penolakan untuk memberikan penggantungan. Peguam plaintif menghujahkan bahawa keputusan pesuruhjaya kehakiman patut disahkan berdasarkan dua alasan; bahawa afidavit sokongan defendan hanya menyatakan defendan bersedia untuk merujuk kepada penimbangtara tetapi ia tidak menyatakan bahawa defendan bersedia dan sanggup untuk berbuat demikian, dan bahawa defendan telah mengambil langkah dalam tindakan sebelum memohon untuk penggantungan.

Diputuskan, membenarkan rayuan:

(1) Dalam menyiasat sama ada berlakunya atau tidak pertikaian yang termasuk di dalam fasal timbangtara, pesuruhjaya kehakiman telah melebihi peranan yang diperuntukkan kepadanya apabila menghakimi permohonan penggantungan prosiding di bawah s 6 Akta Timbangtara 1960 ('Akta tersebut'). Mahkamah hendaklah memerintahkan kedua belah pihak mematuhi terma-terma perjanjian timbangtara yang dimasuki oleh kedua-duanya walaupun nyata daripada keterangan, defendan tidak mempunyai harapan untuk berjaya di hadapan penimbangtara (lihat ms 503E–G); *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 diikut.

(2) Frasa 'dispute or difference concerning the contract' yang digunakan di sini adalah cukup luas untuk merangkumi jenis kontroversi yang wujud di antara plaintif dan defendan sebelum pengeluaran writ. Kegagalan untuk mencapai persetujuan mungkin tidak menjadikannya satu pertikaian, tetapi ia adalah satu ketidaksefahaman. Bagaimanapun, pesuruhjaya kehakiman di dalam rayuan ini hanya menumpukan perhatiannya kepada perkataan 'dispute' tetapi tidak menimbangkan perkataan-perkataan 'or difference'. Sekiranya beliau berbuat demikian, beliau akan mendapati bahawa ia adalah satu ketidaksefahaman walaupun ia bukan satu pertikaian (lihat ms 506H–I); *Tan Kok Cheng & Sons Realty Co S dn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273 diikut.

(3) Pesuruhjaya kehakiman telah meminta pihak defendan menunjuk sebab mengapa kedua belah pihak harus merujuk kepada penimbangtara dan bukannya membuat litigasi. Sesungguhnya, adalah bagi seorang plaintif untuk menunjukkan mengapa suatu perjanjian untuk merujuk kepada penimbangtara yang jelas mengikat kedua belah pihak harus diketepikan. Jadi, nampaknya pesuruhjaya kehakiman telah menterbalikkan beban yang telah dikenakan oleh undang-undang. Selanjutnya, dia nampaknya telah meneruskan perbicaraan, atas dasar, fasal timbangtara itu mempunyai kesan menyingkirkan bidang kuasanya. Ini adalah satu penyalaharahan kerana fasal tersebut tidak menyingkirkan bidang kuasa mahkamah tetapi memberi mahkamah budi bicara untuk memberi kebenaran bagi penggantungan tindakan guaman sementara menunggu proses timbangtara selesai (lihat ms 509D–G).

(4) Satu permohonan bagi penggantungan di bawah Akta tersebut tidak akan gagal hanya kerana defendan tidak memasukkan frasa 'ready and willing' di dalam afidavit sokongannya. Apa yang penting ialah mahkamah harus, berdasarkan fakta-fakta yang berada di hadapannya, berupaya meluahkan rasa puas hati bahawa defendan telah bersedia dan sanggup untuk melakukan semua perkara-perkara yang perlu menurut kehendak penimbangtara. Plaintif gagal menyedari bahawa pada peringkat awal, defendan tidak mempunyai tanggungjawab yang banyak di dalam timbangtara dan ini termasuklah menunjukkan kesungguhannya untuk melantik seorang penimbangtara. Keterangan yang ada pada mahkamah menyokong inferens bahawa defendan telah bersedia dan sanggup melakukan semua perkara-perkara yang perlu dilakukan menurut kehendak penimbangtara. Selanjutnya, daripada kronologi perkara-perkara yang telah berlaku, defendan didapati tidak mengambil sebarang langkah di dalam prosiding tersebut sebelum memohon perintah penggantungan daripada mahkamah (lihat ms 509I dan 510A–F); *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 diikut.]

[*Editorial Note*: The respondent has applied for leave to appeal to the Federal Court vide Application No 08–98–97(W).]

Notes

For cases on application for stay of proceedings, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 808–822.

Cases referred to

Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177 (refd)

F & G Sykes (Wessex) Ltd v Fine Fare Ltd [1967] 1 Lloyd's Rep 53 (refd)

Kong Wah Housing Development Sdn Bhd v Desplan Construction Trading Sdn Bhd [1991] 3 MLJ 269 (refd)

London and North Western Railway v Jones [1915] 2 KB 35 (refd)
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (refd)
Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd [1991] 3 MLJ 309 (folld)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (folld)
Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena) [1995] 3 MLJ 273 (folld)
Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd [1993] 1 SLR 876 (refd)

Legislation referred to

Arbitration Act 1950 s 6

Appeal from: Suit No S3–22–308 of 1996 (High Court, Kuala Lumpur)

Shahul Hamid Amiruddin (*Dason & Co*) for the appellant.
Low Kim Leng (*Leonard Yeoh Soon Beng* with him) (*Soo Thien Ming & Nashrah*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering judgment of the court): This is an appeal against the decision of the High Court refusing an application by the defendant (the appellant before us) to stay proceedings pending reference to arbitration. We heard arguments on 17 November 1997 and reserved our decision to 19 November 1997, on which date we allowed the appeal. The reasons for our decision now follow.

On 30 June 1995, the plaintiff (respondent in this appeal) entered into a contract with the defendant. It was a contract for work and materials. It contained a clause by which the parties agreed to refer their disputes to arbitration. The agreement to arbitrate is contained in art 4 of the contract. It reads:

> If any dispute or difference concerning this contract shall arise between the employer [the defendant] or the designer/supervising officer on his behalf and the contractor [the plaintiff] such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties or, failing agreement within 14 days after either party has given to the other a written request to concur in appointment of an arbitrator, a person to be appointed on the request of either party by the president of the time being of the Pertubuhan Akitek Malaysia.

In October 1995, a controversy arose between the parties about the liquidated and ascertained damages which the defendant alleged was due from the plaintiff because of the latter's delay in carrying out the work in question. On 2 January 1996, the plaintiff's solicitors wrote to the defendant

demanding a sum of RM338,164.32 which was allegedly due to their client. The defendant responded through its solicitors on 8 January 1996, and apart from disputing the sum claimed, put the plaintiff on notice that if a suit was commenced, the defendant would apply to stay it because of the agreement to arbitrate. Despite this unequivocal stance taken by the defendant, the plaintiff, on 26 June 1996, issued writ. The defendant then took out a summons to stay the action in reliance of the arbitration clause. The learned judicial commissioner refused to stay the action primarily on the ground that there was no dispute between the parties that came within the terms of the agreement to arbitrate. This is how she put it:

> The defendant invokes art 4 of the contract whereby any dispute between the parties shall be referred to arbitration. The defendant in para 7 of his affidavit states that he is ready to go to arbitration over this dispute.
>
> Thus at the outset, this court has to determine whether there is a dispute between the parties, as envisaged by art 4 of the contract. If there is, whether it is one where the court's jurisdiction may be ousted, and the matter is to be referred to arbitration as agreed between the parties.
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> This court therefore is to be satisfied that the matter before the court is a dispute and therefore falls to be settled in accordance with the provision of the article — *CCB v Hj Rosli* (1991) SCR 256.
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> The contract agreement signed between plaintiff and defendant does not contain any definition of the term 'dispute', thus this court would have to rely on interpretation found in authorities such as the *Gujarat State Co-operative Land Development Ltd v PR Mankad & Anor* AIR 1979 SC 1203 where the word 'dispute' was defined in the following terms:
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> > 'The term dispute means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.'
>
> The defendant's affidavit filed on 16 July 1995 does not state in clear terms what the 'dispute' relates to which would justify an order for stay. The defendant merely denies the claim for payment made by plaintiff. It was submitted by counsel for defendant that the plaintiff was late for 116 days in completing his work.
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> The defendant relied on minutes of on-site meetings to support this contention.
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> The court has had sight of the said minutes and is of the view that although the stop work order ended on 26 January 1995, the on-site meetings in any event were held after that date. However, I could find nothing adverse against the plaintiff in the minutes of these on-site meetings.
>
> The meeting held on 20 June for instance, is telling. It talks about the delays occasioned by *other* sub-contractors, a point which has been strenuously raised time and again by the plaintiff. Thus these minutes confirms the plaintiff's protestations regarding the evidence of delay of *other* sub-contractors, thus resulting in his own.
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> Although the job/work description as are found in exh HWK-1 is the plaintiff's creation, it does synchronize with the contractual terms of the 30 June 1995 contract between plaintiff and defendant.
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> The meeting held on 13 June 1995 does not make specific reference to the plaintiff's delays, if any. In fact, the meeting of 23 July 1995 indicated that the plaintiff is ahead of schedule.

A Even if there was delay, this was explained by the plaintiff through his affidavits. It might be of interest to note that these on-site meetings were held even after the stipulated completion period. *Thus I fail to see the merit of defendant's argument.*

The plaintiff had written a letter (exh HWK–2) dated 14 March 1995 to the defendant's agent Bent Severin, complaining that the delay occasioned B by other sub-contractors somewhat sets him back too.

The plaintiff submitted his demand for payment supported by architect's certificate issued by the agent appointed by defendant himself (see exh HWK–3A–D) and relies on certificate No 3 in his exh HWK–3.

In fact, Bent Severin's letter in exh HWK–5 to the defendant clearly C indicated satisfaction over the apparent delay caused by the plaintiff and recommended that the plaintiff be paid accordingly.

Based on those facts, I would find that there is no dispute within the meaning of the clause on arbitration ie art 4 of the contract.

The defendant has not satisfied the court, which he has to, in this application that there is a dispute, before the court can exercise its discretion based on proper D *principles of law* (*Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309). (Emphasis added.)

With respect, we are unable to agree with the approach adopted by the judicial commissioner and the conclusion at which she arrived.

A reading of the judgment appealed against makes it clear that the E judicial commissioner proceeded at length to investigate the merits of the contest between the parties in order to determine whether there was a dispute that fell within the arbitration clause. In so doing, she exceeded the role assigned her when dealing with an application for a stay of proceedings under s 6 of the Arbitration Act 1950 ('the Act'). She ought to have F recognized that a full blown dispute at the date of the issue of the writ is not a *sine qua non* for the exercise of the discretion conferred by s 6 of the Act.

It is settled law that, given a dispute, a court must compel the parties to adhere to the terms of the arbitration agreement entered into by them even though it may appear from the evidence presented upon the application G for a stay that the defendant is unlikely to succeed before the arbitrator.

In *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 where Hashim Yeop A Sani CJ (Malaya), after setting out s 6 of the Act, said (at p 312–314):

H The language of s 6 of the Act is such that if the party which opposes the application for stay can show sufficient reason why the matter should not go to arbitration, the court should not normally grant stay. It is of course the court which must be satisfied that there is sufficient reason for the arbitration provision not to be complied with.

The learned judge in this case would appear to have approached the I task before him by considering the appellant's contention that there was no triable issue.

After examining the affidavits filed the learned judge found the issues of facts to be still in dispute and therefore concluded that the matter should clearly be left to be tried. On the arbitration clause the learned judge

concluded that the plaintiff, being party to the agreement, cannot now choose not to be governed by the arbitration clause if the other party seeks to enforce the arbitration clause. It was, he said, the prima facie duty of the court to act on the agreement, citing Selbourne LC in *Willesford v Watson* (1873) LR 8 Ch 473:

> 'If parties choose to determine for themselves that they will have a domestic forum instead of resorting to ordinary courts, then, ... a prima facie duty is cast upon the courts to act on such agreement.'

Based on materials available, the conclusion of the learned judge on the triable issues is in our view completely justified.

The language used in the arbitration clause in our case is very wide. It covers 'all disputes, differences and questions' which may rise 'at any time' 'touching or arising out of or in respect of' the contract between the parties and they 'shall be referred' to arbitration. We do not think the arbitration clause can be misunderstood as to what the actual intention of the parties is, that is the parties had agreed to go to arbitration to settle any dispute, difference or question.

In *The Evje* [1974] 2 Lloyd's Rep 57; [1975] AC 797, the arbitration clause there also provided that all disputes from time to time arising out of the contract shall be referred to arbitration. The words 'arising out of' became an issue of interpretation.

Viscount Dilhorne said at p 66:

> 'In *Heyman v Darwins Ltd* [1942] AC 356, Lord Porter said that the words "arising out of a contract" have a wider meaning than the words "under a contract", a view which was repeated by Sellers LJ in *Government of Gibraltar v Kenney* [1956] 2 QB 410. Although the words are different, I must confess my inability to "discern any difference in their content".'

In *Co-operative Central Bank Ltd v Haji Rosli bin Haji Kamaruddin* [1991] 2 MLJ 37, this court had to be satisfied as to the meaning of the word 'dispute' to see whether the matter before the court was a dispute 'touching the business of the appellant' and therefore fell to be settled in accordance with the provisions of s 49(1) of the Co-operative Societies Act 1948. In the course of its judgment, this court adverted to *Arulandan v Malaysian Co-operative Insurance Society Ltd* [1987] 1 MLJ 485 and *Professor Dr A Kahar Bador & Ors v N Krishnan & Ors* [1983] 1 MLJ 412 which held that the words 'dispute touching the business of the co-operative society' must be given a wider interpretation. But as to what the meaning of the word 'dispute' is, *Gujarat State Co-operative Land Development Ltd v PR Mankad & Anor* AIR 1979 SC 1203 was followed in which the word 'dispute' was defined in the following terms:

> 'The term "dispute" means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.'

The arbitration clause in our case as emphasized earlier is very wide and does not only speak of all disputes but also all differences and questions which may arise not at any specific time but at any time.

It was the appellant's contention that the dispute or difference was never raised before the issue of the writ. On a proper appreciation of the background this cannot be true.

A ...

In our view the absence of a developed or fully blown dispute or difference at the date of the issue of the writ, is not a ground for refusing stay, if the court finds there is a dispute or difference, for to hold otherwise would encourage a claimant who was subject to an arbitration agreement but who did not wish to go to arbitration, to rush to court at an early stage B in order to defeat the arbitration agreement.

Once it is established that there has arisen a dispute or difference or question, the language of s 6 of the Act places on the plaintiff the burden to show that it ought not to be referred to arbitration. As correctly stated by the learned judge, the fact that there is apparent weakness in the respondent's case should not be taken as an excuse to brush aside an arbitration clause to which the appellant was a C *party and which was being insisted on by the respondent.*

...

To summarize, once the party asking for the stay has satisfied the court that there is a dispute, difference or question between the parties within the meaning of the arbitration clause, then it is a question of exercising the discretion to grant or D *not to grant the stay. This discretion of the court must of course be exercised judicially and exercised according to the proper principles of law. If the appellate court is satisfied that the discretion was properly exercised, the order granted should not be disturbed.* (Emphasis added.)

In *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273 at p 280, the Federal Court when considering the E point said:

The law reports are replete with cases in which courts have refused a stay on the ground that no dispute or difference as contemplated by the particular arbitration clause in those cases has arisen. Some of these appear in the judgment of the learned judge. The rationale of those cases may be summed F up in the words of Shah J in *Union of India v Birla Cotton Spinning & Weaving Mills Ltd* AIR 1967 SC 688, no doubt spoken in another factual context:

> 'But the union is not seeking to go to arbitration on a dispute between the parties about a breach committed by one side or the other or whether circumstances have arisen which have discharged one or both G parties from further performance. *It is a case in which in substance there is no dispute between the parties "under", "in connection with" or even "with regard to" the contract.* The plea raised by the union for stay of the suit was frivolous.'

From a reading of the authorities we are unable to discern any requirement that the dispute or difference should be bona fide — the adjective used by H the learned judge to describe the nature of a dispute entitling a defendant in a suit to move a court under s 6 of the Act. It is therefore necessary for us to decide whether this added requirement should be imposed upon a party who seeks to stay an action under s 6 of the Act.

We apprehend that there are two courses open to us in this matter. The I first is to interpret the words 'sufficient reason' appearing in s 6 of the Act as imposing a very light burden on a plaintiff to show that the action should proceed. This may be achieved by placing little weight on the agreement to arbitrate and by recognizing an untrammelled discretion in the court hearing

an application for a stay. One may, for instance, be prepared to uphold the exercise of discretion by a judge that there is no bona fide dispute. This course is, however, fraught with danger. There is the danger that it may entitle a party to a contract to disregard an obligation he had willingly undertaken.

Further, the added condition that a dispute must be bona fide in order for a stay to be granted would take the court into an exercise that *ex necessitae rei* involves a critical examination of the merits of the claim. Such an exercise is not contemplated by the Act and is certainly outside the parameters of the court's function under s 6.

In *Gaya Electric Supply Co Ltd v State of Bihar* AIR 1953 SC 182 at p 185, Mahajan J explained the role of a court faced with an application for a stay of proceedings under the Indian equivalent of s 6 of the Act in a passage that merits reproduction:

> 'Now this is the very point which would be in issue in the suit itself, and the learned judge was in error in considering and deciding this point in this enquiry under s 34. *The validity of the plaintiffs' contention in the suit cannot be gone into by that court exercising jurisdiction under this section as its function, is a very limited one.* The only point in such cases to be decided is whether the claim which is brought — whether it is good, bad or indifferent — comes within the submission to arbitration. It may be that there are grounds upon which the defendant would be able to satisfy the proper tribunal that the plaintiff's claim was frivolous and vexatious, but those considerations, as pointed out by Bankes LJ in *Monro v Bognor Urban Council* [1915] 3 KB 167, are material only if the question to be considered is whether the case made was a frivolous and vexatious one, and ought to have had no weight at all upon the question of what the plaintiff's claim in fact was and one can only find out what his claim is by looking at the plaint.'

We would respectfully adopt these views as our own and merely add that the observations made by Mahajan J apply with equal force to a defendant. When considering an application under s 6 of the Act, it is no part of the court's function to decide whether the defendant has raised a bona fide dispute warranting a stay. The strength or weakness of the issues raised by a defendant must await the decision of the tribunal especially chosen by the parties to decide the differences that have arisen between them. It is only in plain and obvious cases, where a reasonable tribunal, without undertaking a meticulous examination of the merits, is bound to hold that the issues raised by a defendant are frivolous or vexatious, that a court may be justified in refusing a stay. (Emphasis added.)

The agreement to arbitrate in the present instance uses the phrase 'dispute or difference concerning the contract' which, in our judgment, is language of wide import. It is certainly wide enough to include the kind of controversy that existed between the plaintiff and the defendant immediately prior to the issuance of the writ. Although there may not be a dispute, yet there may be a difference between the parties concerning the contract. A failure to agree may not be a dispute; yet it is a difference. However, the judicial commissioner in the present appeal only directed her mind to the word 'dispute' but omitted from consideration the words 'or difference'. Had she done so, she would have found that the factual matrix before her amounted to a 'difference' even if, as she held, that it did not amount to a 'dispute'.

In *F & G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1 Lloyd's Rep 53, an arbitration clause had in it the words 'if any difference shall arise'. Danckwerts LJ in the course of delivering his concurring judgment said:

> The word 'differences' seems to me to be particularly apt for a case where the parties have not agreed: Viscount Dunedin said in the case which was quoted to us of *May and Butcher Ltd v The King* [1934] 2 KB 17: '... a failure to agree ... is a very different thing from a dispute.' But it seems to me that the word 'difference' is particularly apt to describe that situation.

The scope of a court's function in deciding whether a particular fact pattern constitutes a 'dispute or difference' within an agreement to arbitrate was considered by the Singapore High Court in *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1993] 1 SLR 876. GP Selvam J (then sitting as a judicial commissioner), a judge of much learning whose views are entitled to great respect, said (at pp 879–880):

> Jurisdiction to stay action
>
> First the law. Section 7 of the Act confers on the court a discretionary power to stay an action commenced by a party to an arbitration agreement by which it has been agreed to refer the subject matter of the action to arbitration. A court seized of an application must first consider the content and extent of the arbitration agreement to confirm that the subject matter of the action is caught by the arbitration agreement.
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> Thus, in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713, the arbitration agreement was part of a partnership agreement. Pursuant to it English partners sold certain machinery to German partners to be used in partnership operations in Germany. Bills of exchange issued by the Germans in payment for the machinery were dishonoured. When sued in England on the bills of exchange the German partners applied for stay of the action on the ground that the matter ought to be referred to arbitration.
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> The House of Lords held that the arbitration agreement did not extend to an action on the bill of exchange which constituted independent contracts. In addition it was held that there was no dispute as to the claims on the bills of exchange as distinct from 'disputes arising from partnership relationship or occasioned by the partnership relationship between the partnership and the partners' as was stipulated by the arbitration clause.
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> *It therefore follows that where the claim is undisputed or indisputable the courts and not the arbitrators have the jurisdiction to decide upon the claim even though the arbitration agreement stipulates for disputes to be referred to arbitration.* So, in a case where the defendant in the action has made a clear and unqualified admission of the claim, the court cannot stay the action: *London and North Western Railway Co v Jones* [1915] 2 KB 35, *London and North Western and Great Western Joint Railway Companies v JH Billington Ltd* [1899] AC 79 and *Bede Steamship Shipping Co Ltd v Bunge Y Born Limitada SA* (1927) 27 Lloyd's Rep 410.
>
> The common form arbitration agreement provides for disputes to be decided by arbitrators. In such a case the court should, save in obvious cases, adopt a holistic and common sense approach to see if there is a dispute. The justification for this approach is that it is important to hold a party to his agreement and avoid double and split hearing of matters. The reasoning in support of this view is found in *Commercial Arbitration* by MJ Mustill and SC Boyd (2nd Ed) at p 123:

> 'Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled upon by the arbitrator, not the court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to cases where the defence is unsound in fact or law. A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute. The practice whereby the court pre-empts the sole jurisdiction of the arbitrator can therefore be justified only if it is legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed.'
>
> If the defendant, therefore, makes out a prima facie case of disputes, the courts should not embark on an examination of the validity of the dispute as though it were an application for summary judgment. (Emphasis added.)

It is quite apparent from a reading of the learned judicial commissioner's judgment that she embarked upon the very kind of inquiry which the two Malaysian cases we quoted earlier in this judgment — both of which are plainly binding upon her and this court — expressly prohibit. In any event, an examination of the documentary evidence placed before the High Court sufficiently discloses a 'dispute or difference' within the arbitration clause in the present instance. The mere fact that the defendant may have a weak defence to the claim asserted by the plaintiff is no reason to hold, as the judicial commissioner did, that there was no dispute as contemplated by the clause in question. This is certainly not a case, to borrow the words of Mustill & Boyd on *Commercial Arbitration*, where 'the defence is very bad indeed'.

A ready illustration of a case where a court would be entitled to disregard an arbitration clause is provided by *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177. There, VC George J (later JCA) refused to grant a stay on the ground that the debt in question had been admitted and there was accordingly nothing to go to arbitration. His Lordship drew assistance from the following passage in the judgment of Rowlatt J in *London and North Western Railway v Jones* [1915] 2 KB 35 (at p 178):

> It is now quite clear from the decisions in *London and North Western Ry Co v Donellan* [1898] 2 QB 7 and *Midland Ry Co v Loseby* [1899] AC 133 that if there is a difference of any kind arising under the section before action, that matter must be decided by arbitration and the courts have no jurisdiction to determine that difference. It does not, however, follow that the courts cannot be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which the trader merely persists in not paying. This much at any rate is clear from the decision in the House of Lords in *London and North Western and Great Western Joint Ry Cos v Billington* [1899] AC 79, where the company did obtain judgment in the courts although there had been no arbitration. If that case proceeded upon the basis that, as upon the findings of the county court judge the defendant

A had accepted the services with full knowledge of what was charged without contesting their reasonableness, he could not be heard to say that there was any difference and must be treated as having agreed the charges in spite of the fact that he protested he would not pay, no difficulty arises. It may be, however, that though no difference has arisen before action in the shape of a demand made and challenged, it cannot be shown on the other hand that B the demand has been agreed to.

We would also add that the present appeal is readily distinguishable from *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, relied upon by counsel for the defendant because the respondent in that case 'never did refer the dispute concerning C the penultimate progress payment certificate ... to arbitration and having entered appearance and filed a defence to the action is precluded from taking advantage of the remedy of arbitration ... .' (Per Edgar Joseph Jr FCJ at p 62 of the report).

There is another point upon which the learned judicial commissioner D fell into error. In her judgment, she has made it plain that she required the defendant to show why the parties should arbitrate and not litigate. However, the authorities are clear that it is for a plaintiff to demonstrate why an agreement to arbitrate that is plainly binding upon the parties thereto should be thrown overboard. See *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309. The learned judicial E commissioner appears, therefore, to have reversed the burden imposed by law.

Further, the learned judicial commissioner appears to have proceeded upon the basis that the arbitration clause had the effect of ousting her jurisdiction. Hence she said: 'If there is [a dispute], whether it is one *where the court's jurisdiction may be ousted*, and the matter is to be referred to F arbitration as agreed between the parties.' We are of the view that this is a misdirection. The correct approach to the effect of an arbitration clause is that taken by Abdul Malek Ahmad J (now JCA) in *Kong Wah Housing Development Sdn Bhd v Desplan Construction Trading Sdn Bhd* [1991] 3 MLJ 269, where he held that such a clause did not oust the jurisdiction G of the court but the court is given a discretion to grant a stay pending arbitration.

Before us, counsel for the plaintiff argued that the decision of the learned judicial commissioner ought in any event to be upheld for two reasons. First, because the affidavit delivered by the defendant in support H of its application for a stay merely said that it was *ready* to proceed to arbitration but did not say that it was *ready and willing* to do so. This failure, it is submitted, is fatal to the defendant's application.

Now, it is true that s 6 of the Act says that the court may order a stay of proceedings if it is satisfied, inter alia, that 'the applicant at the time I when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.' But we do not apprehend the law to be that an application for stay under the Act is doomed to failure unless a defendant, parrot fashion and in staccato,

employs the phrase 'ready and willing' in his affidavit in support. What is essential is that the court should, on the material before it, be in a position to express its satisfaction that the defendant is 'ready and willing to do all things necessary to the proper conduct of the arbitration.' An acceptance of the submission of the plaintiff's counsel would result in too technical an approach to a matter that rests, by the terms of the statute, in the discretion of the court. Of the submission of counsel for the plaintiff, it may be said that it fails 'to recognize that at such an early stage, there is little a defendant is obliged to do in the arbitration beyond asserting a willingness to appoint an arbitrator and this, of course, means that the plaintiff will be hard put to refute the assertion' (per Edgar Joseph Jr SCJ in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at p 108). The evidence that is available in the present case, when viewed in its entirety reasonably supports the inference that the defendant was, to use the language of the statute, 'ready and willing to do all things necessary to the proper conduct of the arbitration.'

The second point made by counsel for the plaintiff in resisting this appeal is that the defendant had taken a step in the action before making its application for a stay and, like the respondent in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, is precluded from relying upon the arbitration clause. We have carefully examined the relevant chronology of events in this matter as well as the steps taken by both parties to the litigation and find that there is really no merit in the argument of plaintiff's counsel.

The writ in the present case was issued on 20 June 1996. The defendant, after entering an appearance, took out its summons for a stay of proceedings on 16 July 1996. That application was disposed of by the judicial commissioner on 26 September 1996. The defendant then delivered its defence and counterclaim on 13 November 1996. We are therefore of the view that the defendant did not take any step in the proceeding before moving the court for a stay. Indeed, we draw support for our view from the decision in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* where a similar contextual fact pattern did not deter the Supreme Court from ordering a stay of the action.

Having given this matter our most anxious consideration, we came to the conclusion that the learned judicial commissioner had misdirected herself in several important respects when she exercised her discretion against the defendant. We are conscious that in an appeal against the exercise of discretion, the role of this court is rather limited. Our initial function is one of review only and we have no independent discretion to exercise unless it is demonstrated to us that the case falls within one of the categories where appellate interference is warranted. If the primary judicial arbiter in whom the discretion is reposed misdirects himself upon the law or asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations, then and then only is a court of appeal entitled to set aside a decision arrived at and exercise an independent discretion. See *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd.*

A Upon the matter of the exercise of discretion in a case such as the present, the Federal Court in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273, after quoting from the judgment of Edgar Joseph Jr SCJ in *Seloga Jaya* said (at p 282):

> It is implicit in the foregoing passage that, given an agreement to arbitrate
> B and the satisfaction of the conditions set out in s 6 of the Act, a court should lean towards the grant of a stay. This, in our judgment, is the correct approach. The residual discretion which the court retains is limited to a very narrow class of cases, such as those involving fraud or where there is, on a proper construction of the arbitration clause, no dispute that falls within its purview or where the third party procedure under the rules of court will
> C most probably be resorted to. In the last of these situations, it is trite that an arbitrator has no jurisdiction to order third party proceedings.
>
> We are aware of the law's reluctance to create or recognize categories or classes of cases in the realm of the exercise of judicial discretion. But in the area of the law with which we are presently concerned, it is a necessary evil to which resort must be had to ensure that development takes place in
> D an orderly fashion.
>
> Returning now to the facts of the present case, we are satisfied that there was abundant evidence before the learned judge disclosing a dispute upon each of the three issues raised by En Zainur Zakaria in argument. We agree with counsel that there was lacking in this case a proper appreciation of the affidavit evidence on the aforesaid issues. In our judgment, the
> E learned judge applied the wrong test and asked himself the wrong question when he held that there was no bona fide dispute between the parties. Indeed, we are of opinion that the learned judge went too far and was clearly wrong when he held that there must be a bona fide dispute for the s 6 of the Act to bite. In our view a dispute or difference, whether bona fide or not would suffice.

F In the present case, having come to the conclusion that the learned judicial commissioner did not address her mind to the salient aspects of the case and that she had misdirected herself upon the applicable law, we have no alternative but to decide this appeal in the defendant's favour.

For the reasons given in this judgment, we allowed the appeal and set
G aside the order of the judicial commissioner. We made an order in terms of the defendant's summons dated 16 July 1996 and stayed all proceedings pending arbitration. The costs of this appeal and the costs of the proceedings before the High Court were ordered to be taxed and paid by the plaintiff to the defendant. The deposit lodged in court was ordered to be refunded
H to the defendant.

Appeal allowed.

Reported by David Lai

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